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LINDA PRISELAC,)	DOCKET NUMBER
Appellant,)	DC-531D-97-0297-I-1
)	
v.)	
)	
DEPARTMENT OF THE NAVY,)	DATE: JAN 6, 1998
Agency.)	
)	
)	
)	

Wayne R. Wenzel, Esquire, Arlington, Virginia, for the agency.

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair

The appellant petitions for review of the March 25, 1997 initial decision that dismissed this appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the appeal to the regional office for further adjudication.

The agency notified the appellant that she was not performing at an acceptable level of competence, and that as a consequence it was withholding a

scheduled within-grade increase (WIGI). It further notified her that she could seek reconsideration of its determination within 15 days. Initial Appeal File (IAF), Tab 4, Subtab 4E, Enc. 3.¹ Almost six months later, the appellant submitted what she called a "grievance," contesting, *inter alia*, the withholding of the WIGI. *Id.*, Subtab 4B. The agency rejected the grievance on the ground that it had not been submitted by the 15-day deadline provided for in an agency rule. *Id.*, Subtab 4A.

The next day the appellant filed this appeal, and submitted copies of her grievance and the agency's decision thereon. IAF, Tab 1 at 8-9. The administrative judge notified the appellant that the Board "may not have jurisdiction ... in the absence of a reconsideration decision by the agency," and ordered the appellant to file argument and evidence establishing jurisdiction. IAF, Tab 2. After considering the parties' submissions, the administrative judge dismissed the appeal for lack of jurisdiction, on the ground that the appellant "never requested or received" a reconsideration decision from the agency regarding the WIGI withholding. IAF, Tab 7.

The appellant argues in her timely petition for review that the administrative judge did not adequately explain to her what was required to establish jurisdiction, and implies that she did seek reconsideration of the agency's decision to withhold the WIGI. She also contends that the agency violated the regulations that govern performance appraisal systems, performance evaluations, and negative level-of-competence determinations, and that the agency discriminated against her. Petition for Review File, Tab 1. In response, the

¹ Some of the agency's records refer to the appellant as a GM-0855-13 Electronics Engineer, while other records covering the same period refer to her as a GM-0801-13 General Engineer. *See* IAF, Tab 4, Subtabs 4D, 4F, 4G, 4H. This discrepancy is not material to our disposition of the petition for review, so we do not resolve it.

agency asserts that if the appellant's grievance is considered to have been a request for reconsideration, it was properly rejected as untimely. *Id.*, Tab 3.

ANALYSIS

The appellant received a reconsideration decision.

An employee earns a WIGI upon completion of the applicable waiting period so long as, *inter alia*, he or she is performing at an acceptable level of competence. 5 U.S.C. § 5335(a). If an agency determines that an employee is not performing at an acceptable level of competence and withholds a WIGI, the employee is entitled to "an opportunity for reconsideration ... within his [or her] agency under uniform procedures prescribed by the Office of Personnel Management." 5 U.S.C. § 5335(c). "If the determination [to withhold the WIGI] is affirmed on reconsideration, the employee is entitled to appeal to the Merit Systems Protection Board." *Id.* The Board can exercise jurisdiction over an appeal from the withholding of a WIGI only if the agency has affirmed its initial determination upon reconsideration or has unreasonably refused to act on a request for reconsideration. *Shaishaa v. Department of the Army*, 58 M.S.P.R. 450, 453 (1992).

In the present case, we find, contrary to the initial decision, that the appellant received a decision on reconsideration. The appellant's "Administrative Grievance" stated that she was "seeking personal relief in a matter of concern and dissatisfaction relating to ... the denial of a within grade," and went on to describe what she thought were the agency's errors in its decision to withhold the WIGI. IAF, Tab 1 at 8. The agency issued a decision on the grievance. *Id.* at 9. This case differs from *Jones v. Department of the Air Force*, 29 M.S.P.R. 241, 243-44 (1985), where the Board held that a grievance was not an "effective request for reconsideration" of the withholding of the appellant's WIGI because it was not a "written request to the designated reconsideration official setting forth the reasons for reconsideration." Here, the appellant addressed her grievance to "PEO USW,"

which stands for "Program Executive Officer for Undersea Warfare," a post held by Timothy Douglass. The appellant had been instructed to send any reconsideration request to Captain William D. Morris, the Deputy Program Executive Officer for Undersea Warfare. *See* IAF, Tab 4, Subtab 4E, Enc. 3 at 2. Douglass forwarded the grievance to Morris, who issued a decision "as the proper Deciding Official in this matter." IAF, Tab 1 at 9. Considering that OPM's regulations governing WIGIs do not require that a reconsideration request be submitted to any particular official and do not preclude such a request from being made within the context of an administrative grievance, *see* 5 C.F.R. § 531.410, and given that the agency ensured that the appellant's grievance was directed to and considered by the reconsideration official it had designated in its initial decision to withhold the WIGI, we conclude that Morris's rejection of the grievance is the equivalent of a decision on a reconsideration request.

The appeal must be remanded to the regional office to afford the appellant an opportunity to show that the agency's decision to reject her reconsideration request as untimely was unreasonable or an abuse of discretion.

A request for reconsideration of the decision to withhold a WIGI must be made "not more than 15 days after [the employee's] recei[pt] of the notice" that the WIGI is being withheld. 5 C.F.R. § 531.410(a)(1). The 15-day deadline "may be extended when the employee shows he or she was not notified of the time limit and was not otherwise aware of it, or that the employee was prevented by circumstances beyond his or her control from requesting reconsideration within the time limit." 5 C.F.R. § 531.410(b). As noted above, the appellant submitted her reconsideration request almost six months after the initial notification that her WIGI had been withheld. Morris rejected the request on the ground that it had not been submitted by the 15-day deadline for filing an administrative grievance under agency rules. *See* IAF, Tab 4, Subtab 4L at 6. For purposes of this appeal

we deem him to have also rejected it as not having been filed by the 15-day deadline under 5 C.F.R. § 531.410(a)(1).²

When an agency denies a request for reconsideration of the withholding of a WIGI because it was not submitted by the regulatory deadline, the Board will review the record that was before the agency to determine whether the denial was unreasonable or an abuse of discretion. *Bueschel v. Department of Health & Human Services*, 7 M.S.P.R. 21, 23 (1981). If the Board finds that the appellant did not present sufficient evidence to justify extending the deadline under 5 C.F.R. § 531.410(b), the Board lacks jurisdiction over the appeal. *Id.* at 23-24 (interpreting the predecessor to 5 C.F.R. § 531.410(b)). It appears that the appellant was notified of the time limit for seeking reconsideration, *see* IAF, Tab 4, Subtab 4E, Enc. 3 at 2, and it does not appear that she presented any evidence to the agency that would have warranted extending the deadline, *see* IAF, Tab 1 at 8. Still, we cannot decide on this record whether the agency acted unreasonably or abused its discretion in not extending the time limit, because the appellant was not put on notice by the acknowledgment order, any of the agency's pleadings, or the initial decision that in order to establish jurisdiction she must show that the agency acted unreasonably or abused its discretion in not extending the time limit. *See Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643-44 (Fed. Cir. 1985) (before an appeal may be dismissed for lack of jurisdiction, the appellant must receive explicit information on what must be shown to establish jurisdiction). Accordingly, the appeal must be remanded to permit the appellant to submit argument and evidence on the issue of whether the

² A WIGI dispute involving an employee covered by a collective bargaining agreement is reviewable only under the terms of the agreement. 5 C.F.R. § 531.410(d). Here, although the appellant evidently was covered by the agency's administrative grievance procedure, she was not covered by a collective bargaining agreement. *See* IAF, Tab 4, Subtab 2.

agency acted unreasonably or abused its discretion in not extending the deadline for seeking reconsideration of its decision to withhold her WIGI.

ORDER

The initial decision is VACATED. The appeal is REMANDED to the Washington Regional Office for further adjudication. If on remand the administrative judge determines that the agency should have extended the deadline for seeking reconsideration of its WIGI withholding, the administrative judge should adjudicate the merits. *See Bueschel*, 7 M.S.P.R. at 24 (an improper denial of a reconsideration request on timeliness grounds "will serve to constitute exhaustion of remedies," thereby triggering a right of appeal; the matter need not be remanded to the agency for consideration of the merits).

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.